NO. 48792-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

CITY OF TACOMA,

Respondent,

v.

CHEVALIER LEE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Kitty-Ann van Doorninck

BRIEF OF APPELLANT

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RULES, STATUTES, OTHER

A. ASSIGNMENTS OF ERROR

1. The trial court erred in excluding evidence that supported appellant's assertion that he acted in self-defense.

2. The prosecutor committed misconduct during closing argument.

3. Appellant was denied his constitutional right to effective assistance of counsel.

4. Cumulative error denied appellant his right to a fair trial.

5. In the event the City substantially prevails on appeal, this Court should deny any request for costs.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court violate appellant's constitutional right to present a complete defense by excluding evidence that supported his assertion that he acted in self-defense?

2. Did the prosecutor commit misconduct during closing argument by commenting on appellant's constitutional right to remain silent deemed improper by the Washington Supreme Court?

3. Was appellant denied his constitutional right to effective assistance of counsel where defense counsel failed to object to the

prosecutor's improper argument and failed to object to an officer's improper testimony, both of which implied guilt?

4. Did cumulative error deny appellant his constitutional right to a fair trial and the presumption of innocence?

5. If the City substantially prevails on appeal, should this Court exercise its discretion and deny costs where Lee is presumably still indigent because there has been no evidence provided to this Court, and no findings by the trial court, that Lee's financial condition has improved or is likely to improve?

C. STATEMENT OF THE CASE [1]

1. Procedure

On May 12, 2015, the City of Tacoma charged appellant, Chevalier Lee, with one count of assault in the fourth degree. CP 32. Following a two-day trial before the Honorable Elizabeth Verhey, a jury found Lee guilty as charged on August 13, 2015. 08/13/15 RP 1-3; CP 57. Commissioner Dennis Ball entered the guilty finding and sentenced Lee to 365 days in jail with 289 days suspended and credit for 58 days served and ordered $343.00 in fines/costs. 08/13/15 RP 5-10; CP 58.

[1] The record contains four volumes of verbatim report of proceedings which are referred to by the date of the proceedings.

On September 9, 2015, Lee filed a Notice of Appeal to the Superior Court. CP 1-5. The Honorable Kitty-Ann van Doorninck heard oral argument on February 26, 2016, affirmed Lee's conviction, and remanded the matter to the Municipal Court. 02/26/16 RP 3-23; CP 336-37.

Lee filed a Petition for Discretionary Review on March 25, 2016. CP 338-44. On July 21, 2016, Commissioner Aurora R. Bearse filed a ruling, granting discretionary review. CP 353-59.

2. Facts

a. Trial Court Ruling

Defense counsel called Danielle Spicer as his first witness. 08/12/15 RP 51-52. When defense counsel began asking Danielle about an incident occurring four nights before the alleged assault, the prosecutor objected and the court excused the jury. 08/12/15 RP 62. The court asked defense counsel what was the purpose of his line of questioning. Defense counsel explained that four nights before Lee allegedly hit Louis Gonzales Hernandez, Spicer and Lee saw Hernandez become "physical with his wife." 08/12/15 RP 62. Defense counsel asserted that the evidence shows whether Lee acted in self-defense because he knew that Hernandez had the capacity to be aggressive or violent. 08/12/15 RP 62-63. The prosecutor objected, arguing that the evidence was totally irrelevant. 08/12/15 RP 63-

65. The court excluded the evidence, ruling that "[i]t's just more prejudicial than probative of anything." 08/12/15 RP 63-65.

b. Trial Testimony

On January 25, 2015, Chevalier Lee and his girlfriend, Danielle Spicer, were visiting their friends, Louis Gonzalez Hernandez and his wife, Alice Gonzalez, at their home. The Gonzalez's friend, Robert Staunton, was temporarily staying with them and the Gonzalez children were also home. 08/11/15 RP 92-93; 08/12/15 RP 10-11, 22-28, 52-54, 74-75. Lee and Spicer frequently spent time with the Gonzalez family at their home. 08/11/15 RP 103-04, 107; 08/12/15 RP 23-25, 73-75. That evening, Lee and Spicer were playing cards with the children at the kitchen table. 08/12/15 RP 28-29 54, 75. Hernandez was nearby, doing work on his computer while Gonzalez was in the bedroom. 08/11/15 RP 97-98; 08/12/15 RP 29. Staunton was watching television in the living room. 08/12/15 RP 11. Eventually, one child went to the bedroom to play video games and the other children went downstairs. 08/12/15 RP 29-30.

Hernandez testified that everything was good until all of a sudden he heard Lee getting up and swearing at Spicer. Hernandez did not know what was going on, but the argument upset him so he got up and told Lee to leave. Lee said he did not have to leave and Hernandez told him again that he had to leave because he does not like that kind of behavior in his home.

08/12/15 RP 30-31, 45. Hernandez approached Lee and when he told him again to leave, Lee swore at him and hit him in the eye. 08/12/15 RP 31-32. Hernandez tried to push Lee away and contain him. He grabbed Lee and after grappling with him for a couple of minutes, he got Lee out of the house. 08/12/15 RP 33-35, 46-47. Lee said he would not leave without Spicer so she left with him after he was told that the police were called. 08/12/15 RP 35-36, 40.

Lee testified that an argument developed between him and Spicer because she wanted to leave and he wanted to stay at the Gonzalez's house. They were initially talking quietly because "it was kind of embarrassing. We're talking about, you know, overstaying our stay at their house. We had been there four nights already." 08/12/15 RP 75-78. When Lee raised his voice and swore, Hernandez came over and immediately told him to leave. Lee tried to explain and reason with Hernandez and apologized for getting loud in his home. 08/12/15 RP 77-79. When Hernandez told him again to get out of the house, Lee swore at Hernandez and "he came at me." 08/12/15 RP 79. When Hernandez sprang at him with his hands up, Lee hit him because he was scared. Hernandez grabbed him and they wrestled on the ground and Lee ended up "in a chokehold." 08/12/15 RP 79-80. Lee got up and saw Gonzalez, Spicer, and the children who were looking scared so he left. 08/12/15 RP 81.

Staunton was temporarily staying at the Gonzalez's home. 08/12/15 RP 10-11. Staunton testified that he was in the living room watching television when he heard Lee swearing at Spicer. 08/12/15 RP 11-14. When Hernandez asked Lee to leave, he got up and was "like indignant" and said he did not think he had to leave, he did not want to leave. 08/12/15 RP 15. Lee started getting in Hernandez's face and approached him. Hernandez told Chevalier to leave several times and he "was standing his ground" with his hands down until Lee came toward him and then he put his hands in front of him. 08/12/15 RP 15. Hernandez "kinda took a half step back" and told Lee again to leave and Lee swung at him. 08/12/15 RP 16. Hernandez grabbed Lee and wrestled him to the ground. Staunton thought about jumping in but "Louis was handling it." 08/12/15 RP 16. Hernandez got Lee up and shoved him toward the door and he reluctantly left. 08/12/15 RP 16.

Alice Gonzalez was in the bedroom when she heard Lee yelling at Spicer and calling her names. She came out of the bedroom and Hernandez was telling Lee that he had asked him before not to yell and use such language in the house. Hernandez asked Lee to leave but he said he did not have to leave if he did not want to. 08/11/15 RP 98-99. Gonzalez went back into the bedroom and she did not know very much of how the scuffle happened because she was dealing with her kids. 08/11/15 RP 99-100. She

heard Hernandez tell Lee to leave several times and Lee said he was not leaving, but she did not see the altercation. 08/11/15 RP 100-01, 105. When Gonzalez came out of the bedroom, Lee was told that the police were called. The police arrived after Spicer and Lee had left. 08/11/15 RP 101-02.

Spicer testified that she and Lee got into an argument because she wanted to go to her mother's house and he wanted her to stay. 08/12/15 RP 55-56. They were sitting at the dining room table and Hernandez was in the kitchen. When Hernandez heard Lee swearing, he told Lee that he cannot yell in the house and he had to leave. 08/12/15 RP 56-58. Lee got up and tried to explain that they just had a disagreement and it was not a big deal. Hernandez did not want to listen and kept asking Lee to leave. Then Lee swore at him and Hernandez came after Lee. 08/12/15 RP 59. Hernandez quickly moved toward Lee with his hands out and they were wrestling on the ground for about 30 seconds. 08/12/15 RP 60. They stopped fighting but kept exchanging words until Spicer and Lee left. 08/12/15 RP 61-62.

Tacoma police arrived at the Gonzalez home in response to a 911 call. 08/11/15 RP 78-79. Officer Brandon Mires testified that Hernandez was standing by the front door. He had an ice pack over his left eye which was swollen. 08/11/15 RP 80. Hernandez reported that he intervened in a "fight" between Lee and his girlfriend which led to an argument with Lee. When Hernandez asked Lee to leave, he punched him. 08/11/15 RP 82-83.

Officer Mires interviewed Hernandez's wife and two other people in the house. 08/11/15 RP 81. He did not interview Lee or his girlfriend because "[t]hey had fled prior to police arrival." 08/11/15 RP 85-87.

c. Closing Argument

During closing argument, the prosecutor argued that it is significant that the Defendant and his girlfriend did not stay in the area:

> They did eventually leave. But we know they did not call 911. And Danielle even said she had a cell phone. And Defendant thinks he might have called her. She thinks he called her or -- but she said, she had a cell phone with her; she had a phone. She could have called 911. Nobody called 911. The officer said, "No, after when I was there at the house, I was doing my investigation, nobody called 911 about this incident." He would have known about it because he was associated with the investigation, but no 911 call came in regarding this incident. And they had a phone, they had access to call. And they did not stay in the area. They left the house, but did they go like stand out on the corner? And they knew the police were coming. The Defendant knew the police were being called so, they knew, "Okay, cops are on their way." They don't stay -- and if the Defendant really thought, "Hey, I'm the victim here," wouldn't you stay and wait for the police to come and stay in the area, and when the police got there, say, "Wait a minute, here's what happened. I want to make -- I want to tell you what happened." He didn't do that. Nobody did. As far as -- there was nobody called -- the Defendant or his girlfriend called 911 to report anything. And so, by insinuating, I think what the testimony was that, oh, the Defendant didn't get an opportunity to tell his side. Well, it wasn't because the officer didn't do his job. There was nobody there to talk to. He wasn't there, and there was no -- there was no reason for the officer to think he -- well, they did try to go find him in the area. They couldn't find him. The other officer drove around, but they didn't find anybody. So, there was nobody to talk to to try to get the other side of the story.

08/12/15 RP 134-36.

D. ARGUMENT

This Court established that "under the cumulative error doctrine, we may reverse a defendant's conviction when the combined effect of errors during trial effectively denied the defendant [his] right to a fair trial, even if each error standing alone would be harmless." *State v. Venegas*, 155 Wn. App. 507, 519-20, 228 P.3d 813 (2010), *review denied*, 170 Wn.2d 1003 (2010)(citing *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006); *State v. Hodges*, 118 Wn. Appl 668, 673-74, 77 P.3d 375 (2003). The doctrine does not apply where the errors are few and have little or no effect on the outcome of the trial. *Venegas*, 155 Wn. App. at 520 (citing *Weber*, 159 Wn.2d at 279).

1. THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE THAT SUPPORTED LEE'S ASSERTION THAT HE ACTED IN SELF-DEFENSE THEREBY VIOLATING HIS CONSTITUTIONAL RIGHT TO PRESENT A COMPLETE DEFENSE.

Both the Sixth Amendment to the United States Constitution and article I, section 22 (amend. 10) of the Washington Constitution guarantee an accused the right to present a defense. *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). Whether rooted in the Sixth Amendment or Due Process Clause, the United States Constitution guarantees a criminal defendant " 'a meaningful opportunity to present a complete defense.' "

Holmes v. South Carolina, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006)(quoting *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986)). "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L.Ed.2d 297 (1973). The Sixth Amendment right to present a defense is reviewed de novo. *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2014).

In opening statements, defense counsel stated that "[t]his is a case about self-defense, pure and simple." 08/11/15 RP 74. He told the jury that the defense will present evidence that Louis Hernandez Gonzalez was the initial aggressor and he acted in an aggressive manner with the intent to assault Lee. 08/11/15 RP 75. During the testimony of defense witness, Danielle Spicer, defense counsel began questioning her about four nights before the night of the incident. The prosecutor objected and the trial court excused the jury. 08/12/15 RP 62.

The court asked defense counsel what was the purpose of his line of questioning. Defense counsel explained that when Spicer and Lee were at the Gonzalez home four nights earlier, Hernandez and Gonzalez had a dispute and Hernandez "became physical with his wife." 08/12/15 RP 62. Defense counsel argued that the evidence shows whether Lee acted in self-

defense because he knew that Hernandez had the capacity to be aggressive or violent. 08/12/15 RP 62-63. The prosecutor objected, arguing that such testimony is totally irrelevant and would open the door to all kinds of prior incidents. 08/12/15 RP 63. The court agreed that the testimony would open the door, "If you go four days before for the victim, or the alleged victim in this case, then we're gonna do it for the defendant." 08/12/15 RP 64. The court noted that during Hernandez's testimony, it did not allow testimony about how they have told Lee before "that he's not to talk that way or raise his voice in the house." 08/12/15 RP 64-65. The court ruled that the testimony is "more prejudicial than probative of anything" and excluded the testimony. 08/12/15 RP 65.

The court erred in excluding evidence vital to Lee's defense. Lee testified that when Hernandez came at him with his hands up, he hit him because he was scared. 08/12/15 RP 79-80. When Lee said he "had reason to be scared of him already," the prosecutor objected and the court sustained the objection. 08/12/15 RP 80. The court's exclusion of the evidence precluded Lee from explaining why he was scared. The self-defense instruction given to the jury provided that it is a defense to a charge of Assault in the fourth degree that the force used was lawful as defined in this instruction:

> The use of force upon or toward the person of another is lawful when used by a person who *reasonably believes that he is about to be injured* in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary.
>
> The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, *taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.*
>
> The City has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the City has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty as to Assault in the fourth degree.

CP 47 (Instruction No. 9)(emphasis added).

Testimony by Lee that four nights before the incident, he was at the Gonzalez home when Hernandez became physical during a dispute with his wife would support Lee's assertion that when Hernandez came at him, he defended himself because he reasonably believed that he was about to be injured. The court's exclusion of the evidence allowed the prosecutor to argue during closing argument that "there was no reasonable fear on the defendant's part." 08/12/15 RP 123.

Evidence that a defendant seeks to introduce "must be of at least minimal relevance." *State v. Darden*, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). Clearly, evidence that Lee knew Hernandez could become violent was relevant to his assertion that he acted in self-defense because it had the

tendency "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. In *State v. Upton*, this Court recognized that "[s]uccessful assertion of self-defense as a defense requires not only that a defendant prove he honestly believed he was in danger of receiving great personal injury from his victim, but that he also had reasonable grounds for his belief." 12 Wn. App. 195, 202, 556 P.2d 239 (1976), *review denied*, 88 Wn.2d 1007 (1997). This Court therefore concluded that proof "that a defendant knew of a non–remote specific act of violence committed by the victim is admissible in support of defendant's theory of self-defense." 12 Wn. App. at 202 (citing *State v. Adamo*, 120 Wn. 268, 207 P. 7 (1922), *State v. Walker*, 13 Wn. App. 545, 536 P.2d 657 (1975), *State v. Cloud*, 7 Wn. App. 211, 498 P.2d 907 (1972)).

"[I]f relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." *Darden*, 145 Wn.2d at 622. The record substantiates that the testimony would not have prejudicially disrupted the fairness of the trial because Spicer and Lee would be subject to the crucible of cross-examination and the City had an opportunity to call rebuttal witnesses 08/12/15 RP 88. Furthermore, as the court observed, Hernandez did not testify about prior warnings, but the court overlooked that Gonzalez testified that she came out

of the bedroom and "my husband's telling him that he had asked him prior not to use that language and be yelling like that in the house and asked him to leave." 08/11/15 RP 99. Consequently, the court's reasoning that the testimony would "open the door" was misplaced because the jury had already heard that Hernandez previously told Lee to watch his language and control his temper.

In excluding the evidence, the court violated Lee's constitutional right to present a complete defense and the error was not harmless. An error of constitutional magnitude can be harmless if it is proved to be harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L.Ed.2d 795 (1967). The error is harmless if the reviewing court is "convinced beyond a reasonable doubt that any reasonable jury would have reached the same result without the error." *State v. Smith*, 148 Wn.2d 122, 139, 59 P.3d 74 (2002). Prejudice is presumed and the State bears the burden of proving that the error was harmless beyond a reasonable doubt. *State v. Coristine*, 177 Wn.2d 370, 380, 300 P.3d 400 (2013)(citing *Chapman*, 386 U.S. at 24).

The record reflects that there was conflicting testimony among the four witnesses to the incident. Hernandez testified that after repeatedly telling Lee to leave, he approached Lee and told him again to leave and Lee swore at him and hit him in the eye. 08/11/15 RP 30-32. Staunton testified

that Lee came toward Hernandez and when Hernandez told him to leave, he "swung at" Hernandez. 08/12/15 RP 15-16. To the contrary, Lee testified that he tried to explain and apologized, but Hernandez kept telling him to leave. When Lee swore at Hernandez, he came at him and Lee hit Hernandez because he was scared. 08/12/15 RP 78-80. Spicer testified that Hernandez would not listen when Lee tried to explain that he and Spicer just had a disagreement and it was not a big deal. When Hernandez continued to tell Lee to leave, Lee swore at him and Hernandez quickly came after Lee with his hands out. 08/12/15 RP 59-60.

In light of the lack of overwhelming evidence, if the jury had heard testimony that Lee knew Hernandez could become violent, it could have reasonably concluded that Lee acted in self-defense and that the City failed to prove the absence of self-defense beyond a reasonable doubt. *See* CP 47 (Jury Instruction 9). The trial court erred in excluding evidence supporting Lee's assertion of self-defense thereby violating his constitutional right to present a complete defense and the court's error was not harmless beyond a reasonable doubt.

2. THE PROSECUTOR COMMITTED MISCONDUCT DURING CLOSING ARGUMENT BY COMMENTING ON LEE'S FIFTH AMENDMENT RIGHT TO REMAIN SILENT DEEMED IMPROPER BY THE WASHINGTON SUPREME COURT.

A prosecutor "functions as the representative of the people in a quasijudicial capacity in a search for justice." *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). A prosecutor does not fulfill this role "by securing a conviction based on proceedings that violate a defendant's right to a fair trial—such convictions in fact undermine the integrity of our entire criminal justice system." *State v. Walker*, 182 Wn.2d 463, 476, 341 P.3d 976 (2015). Prosecutorial misconduct may deprive the defendant of a fair trial. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

The Fifth Amendment to the United States Constitution and article I, section 9 of the Washington Constitution provide an accused the right against self-incrimination. At trial, the State may not elicit comments from witnesses or make closing arguments relating to a defendant's silence to infer guilt from his silence. *State v. Easter*, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996). As the United States Supreme Court declared in *Miranda*, "[t]he prosecution may not . . . use at trial the fact [the defendant] stood mute or claimed his privilege in the face of accusation." *Easter*, 130 Wn.2d at 236 (quoting *Miranda v. Arizona*, 384 U.S. 436, 468 n.37, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966)).

In *State v. Jones*, during closing argument, the State argued that after Jones was accused of rape, he did not call the police:

> [W]hat did the defendant do after this took place? What did he do? . . . [D]id he clear up any misunderstanding? No. Did he find Detective Shepherd and say, 'Boy, big misunderstanding here. We need to clear this up?' No . . . . He didn't come right back up and say, 'Let's clear this up.' He didn't call Detective Shepherd and go, 'Holy cow, I've got a warrant out for rape for me. I better get to the bottom of this.' "

Jones, 168 Wn.2d at 718.

The Washington Supreme Court concluded that the prosecutor committed misconduct by arguing that Jones fled to Texas and never called the police to try to clear up what had happened. The Court held that because Jones had a Fifth Amendment right to remain silent with the police, the comment was improper. "We go so far as to say that the court's imprimatur is now upon the State and that such argument is improper and should not be repeated." *Jones,* 168 Wn.2d at 725.

As in *Jones,* during closing argument here, the prosecutor improperly commented on Lee's right to remain silent:

> . . . And we also know that -- and this [is] significant -- that the Defendant, neither the Defendant or his girlfriend, Danielle, stayed around the area. They did eventually leave. But we know they did not call 911. And Danielle even said she had a cell phone. . . . They left the house, but did they go like stand out on the corner? And they knew the police were coming. The Defendant knew the police were being called, so they knew, "Okay, cops are on their way." They don't stay -- and if the Defendant really thought, "Hey, I'm the victim here," wouldn't you stay and wait for the police to come and

> stay in the area, and when the police got there, say, "Wait a minute, here's what happened." He didn't' do that. . . .

08/12/15 RP 134-35.

The prosecutor's improper argument is indistinguishable from the argument prohibited by the Supreme Court and was not merely a brief comment but extensive in its entirety. 08/12/15 RP 134-36. Furthermore, the prosecutor's comment on Lee's right to remain silent cannot be justified as impeachment because Lee never made any prior inconsistent statements. 08/12/15 RP 73-88. *State v. Burke*, 163 Wn.2d 204, 219, 181 P.3d 1 (2008)("This court has been careful to limit the use of silence to impeachment only. Impeachment is evidence, usually prior inconsistent statements, offered solely to show the witness is not truthful.")

3. DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO OBJECT TO THE PROSECUTOR'S IMPROPER COMMENT ON LEE'S RIGHT TO REMAIN SILENT AND THE OFFICER'S IMPROPER TESTIMONY, BOTH OF WHICH IMPLIED GUILT.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984*); State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987).

To demonstrate ineffective assistance of counsel, a defendant must show that (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced defendant, i.e. there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceedings would have been different. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)(citing *Thomas*, 109 Wn.2d at 225-26)(applying the two-prong test in *Strickland*, 466 U.S. at 687)). If counsel's conduct can be characterized as "legitimate trial strategy or tactics," it cannot serve as a basis for a claim of ineffective assistance of counsel. *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991).

a. Failure to object to the prosecutor's improper closing argument.

The most obvious responsibility for putting a stop to prosecutorial misconduct "lies with the State, in its obligation to demand careful and dignified conduct from representatives in court. Equally important, defense counsel should be aware of the law and make timely objection when the prosecutor crosses the line." *State v. Neidigh*, 78 Wn. App. 71, 79, 95 P.2d 423 (1995). "If either counsel indulges in any improper remarks during closing arguments, the other must interpose an objection at the time they are

made. This is to give the court an opportunity to correct counsel, and to caution the jurors against being influenced by such remarks." 13 *Royce A. Ferguson, Jr., Washington Practice: Criminal Practice and Procedure* section 4505, at 295 (3d ed. 2004).

Here, the prosecutor committed misconduct during closing argument by improperly commenting on Lee's constitutional right to remain silent. Defense counsel did not object to the prosecutor's improper argument. 08/12/15 RP 134-36. Defense counsel's failure to object constitutes deficient representation because counsel had a duty to timely object to argument that the Supreme Court deemed improper and emphatically prohibited.

The record substantiates that Lee was prejudiced by defense counsel's deficient representation because as a result of counsel's failure to object, the prosecutor's comment on Lee's silence improperly implied guilt. Lee was deprived of his right to effective assistance counsel where there was no strategic or tactical reason for failing to object to argument clearly prohibited by the Supreme Court.

b. Failure to object to the officer's improper testimony.

During re-direct examination, when the prosecutor asked Officer Brandon Mires why he did not interview the defendant and his girlfriend,

Mires responded, "They had *fled* prior to police arrival." 08/11/15 RP 87 (emphasis added). Defense counsel did not object. His failure to object constitutes deficient representation because "[n]o witness, lay or expert, may testify to his opinion as to the guilt or innocence of the accused in a criminal trial, whether by direct statements or inference." *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). Importantly, the court's order in limine prohibited opinions by any witness on guilt or innocence. 08/11/15 RP 11-12. Mires testified that he interviewed witnesses, but he never said that the witnesses told him that Lee ran away or fled. 08/11/15 RP 80-84. Consequently, his opinion that Lee fled was improper.

Lee was deprived of his right to effective assistance counsel where there was no strategic or tactical reason for failing to object to Officer Mires's unfounded and improper opinion. Lee was prejudiced by defense counsel's deficient representation because Mires's opinion that he "fled" implied guilt. Testimony from an officer may be especially prejudicial because an officer's testimony often "carries a special aura of reliability." *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007).

4. REVERSAL IS REQUIRED BECAUSE CUMULATIVE ERROR DENIED LEE HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

The Sixth Amendment to the United States Constitution and article I, section 21 of the Washington State Constitution guarantee a criminal

defendant the right to a fair trial and an impartial jury. *State v. Johnson*, 152 Wn. App. 924, 934, 219 P.3d 958 (2009). "Only a fair trial is a constitutional trial." *State v. Coles*, 28 Wn. App. 563, 573, 625 P.2d 713, *review denied*, 95 Wn.2d 1024 (1981)(citing *State v. Case*, 49 Wn.2d 66, 298 P.2d 500 (1956)). Under the cumulative error doctrine, a defendant may be entitled to a new trial where errors cumulatively produced a trial that was fundamentally unfair. *In re Personal Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994). Appellate courts do not need to decide whether these deficiencies alone were prejudicial where other significant errors occurred that, considered cumulatively, compel reversal. *Mak v. Blodgett*, 970 F.2d 614, 622 (9th Cir. 1992).

The record here establishes that reversal is required because the accumulation of errors denied Lee his constitutional right to a fair trial and the presumption of innocence: 1) the trial court violated Lee's constitutional right to present a complete defense by excluding evidence supporting his assertion that he acted in self-defense; 2) the prosecutor committed misconduct during closing argument by commenting on Lee's constitutional right to remain silent which the Supreme Court condemned as improper; 3) defense counsel provided ineffective assistance of counsel by failing to object to the prosecutor's improper closing argument and the officer's improper testimony, both of which implied guilt.

5. IF THE CITY SUBSTANTIALLY PREVAILS ON APPEAL, THIS COURT SHOULD EXERCISE ITS DISCRETION AND NOT AWARD COSTS BECAUSE LEE REMAINS INDIGENT.

Under RCW 10.73.160 and RAP Title 14, this Court may award costs to a substantially prevailing party on appeal. RAP 14.2 provides in relevant part:

> A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review.

National organizations have chronicled problems associated with legal financial obligations (LFOs) imposed against indigent defendants. These problems include increased difficulty in reentering into society, the doubtful recoupment of money by the government, and inequity in administration. *State v. Blazina*, 182 Wn.2d 827, 835, 344 P.3d 680 (2015)(citing, et al., AM. CIVIL LIBERTIES UNION, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTOR'S PRISONS (2010)). In 2008, The Washington State Minority and Justice Commission issued a report that assessed the problems with the LFO system in Washington. The report points out that many indigent defendants cannot afford to pay their LFOs and therefore the courts retain jurisdiction over impoverished offenders long after they are released. Legal or background checks show an active court record for those who have not paid their LFOs, which can

have negative consequences on employment, on housing, and on finances. *Blazina*, 182 Wn.2d at 836-37.

In *State v. Nolan*, 141 Wn.2d 620, 8 P.3d 300 (2000), the Washington Supreme Court concluded that an award of costs "is a matter of discretion for the appellate court, consistent with the appellate court's authority under RAP 14.2 to decline to award costs at all." The Court emphasized that the authority "is permissive" as RCW 10.73.160 specifically indicates. *Nolan*, 141 Wn.2d at 628. The statute states that the "court of appeals, supreme court, and superior courts *may* require an adult offender convicted of an offense to pay appellate costs." RCW 10.73.160(1)(emphasis added).

In the event the State substantially prevails on appeal, this Court should exercise its discretion and not award costs where the trial court determined that Lee is indigent. The trial court found that he is entitled to appellate review at public expense due to his indigency and entered an Order of Indigency on April 13, 2016. CP 351-52. This Court should therefore presume that Lee remains indigent because the Rules of Appellate Procedure establish a presumption of continued indigency throughout review:

> A party and counsel for the party who has been granted an order of indigency must bring to the attention of the trial court any significant improvement during review in the financial condition of the party.

> The appellate court will give a party the benefit of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent.

RAP 15.2(f).

In *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016), the Court exercised its discretion and ruled that an award of appellate costs was not appropriate, noting that the procedure for obtaining an order of indigency is set forth in RAP Title 15 and the trial court is entrusted to determine indigency. "Here, the trial court made findings that support the order of indigency. . . . We have before us no trial court order finding that Sinclair's financial condition has improved or is likely to improve. . . . We therefore presume Sinclair remains indigent." *Sinclair*, 192 Wn. App. at 393.

As in *Sinclair*, there has been no evidence provided to this Court, and no findings by the trial court, that Lee's financial condition has improved or is likely to improve. Lee is presumably still indigent and this Court should exercise its discretion to not award costs.

E. CONCLUSION

For the reasons stated, this Court should reverse Mr. Lee's conviction where the "combined effect of the accumulation of errors most certainly requires a new trial." *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1994).

DATED this 12th day of January, 2017.

Respectfully submitted,

/s/ Valerie Marushige
VALERIE MARUSHIGE
WSBA No. 25851
Attorney for Appellant

DECLARATION OF SERVICE

On this day, the undersigned sent by email, a copy of the document to which this declaration is attached to the City of Tacoma Prosecutor's Office at vladd@cityof tacoma.org and by U.S. Mail to Chevalier Lee, 9518 Veterans Drive SW # 1, Lakewood, Washington 98498.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 12th day of January, 2017.

/s/ Valerie Marushige
VALERIE MARUSHIGE
Attorney at Law

MARUSHIGE LAW OFFICE

January 12, 2017 - 11:49 AM

Transmittal Letter

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